No. 19A____

IN THE

Supreme Court of the United States

ROBERT M. WAGGY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 20, 2019

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Robert M. Waggy respectfully requests a 60-day extension of time, to and including February 3, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. The Ninth Circuit entered judgment on September 5, 2019. *See United States* v. *Waggy*, 936 F.3d 1014 (App. 1a-16a). Unless extended, the time to file a petition for certiorari will expire on December 4, 2019. This application is being filed more than ten days before a petition is currently due. *See* S. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Robert W. Waggy is a veteran of the Marine Corps who survived three helicopter crashes while on active duty, leaving him with physical injuries, mental trauma, and a disability from post-traumatic stress disorder. Waggy receives medical care from private doctors who are to be reimbursed by the Department of Veterans Affairs (VA). Many of those bills went unpaid—the VA acknowledges that it improperly failed to pay at least $30,000 in medical bills—thereby subjecting Waggy to collections notice and forcing him to take out high-interest loans to cover the bills.

3. In April 2016, Waggy called a VA center in Spokane, Washington. He asked to speak to the director of the center and was transferred to a secretary in the director's office. Waggy complained that the VA owed him a substantial amount of money and demanded compensation. The secretary who took the call testified that Waggy used vulgar language and was screaming, which led her to hang up the phone. Waggy called back twice more; each time, he again demanded compensation and used profane language, and each time the secretary again hung up on him. He then made four calls that went unanswered.

4. Based on those calls, Waggy was charged with six counts of violating Washington Revised Code § 9.61.230, which applies to federal land in Washington State through the Assimilative Crimes Act, 18 U.S.C. § 13. He was convicted of two counts of violating § 9.61.230(1)(a)-(b). Subsection (a) makes it unlawful to "make a telephone call," "with intent to harass, intimidate, torment or embarrass any other person," "[u]sing any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act." Subsection (b) criminalizes phone calls made with the same intent that are made "[a]nonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues." On the two counts for which Waggy was convicted, the jury was instructed that it could convict him for violating either provision. The jury acquitted Waggy on a charge stemming only from the unanswered phone calls.

5. Waggy appealed to the district court—as the trial was conducted by a magistrate judge—and it upheld his conviction. From there, he appealed to the

Ninth Circuit. He argued principally that his conviction violated the First Amendment because Washington Revised Code § 9.61.230(1)(a) is a content-based regulation of his speech that cannot survive heightened scrutiny, at least as applied to Waggy's speech directed at the government.

6. In a divided 2-1 decision, the Ninth Circuit affirmed. App. 13a. The majority reasoned that, as applied here, § 9.61.230(1)(a) "regulates nonexpressive conduct and does not implicate First Amendment concerns." App. 10a. In justifying why it did not consider Waggy's telephone calls to be speech or to be expressive, the panel emphasized that the jury found that Waggy "intended to harass, intimidate, torment, or embarrass." App. 7a-8a. The panel acknowledged that its opinion was in some tension with the D.C. Circuit's opinion in *United States* v. *Popa*, 187 F.3d 672 (D.C. Circ. 1999), but asserted that case is factually distinct and is anyway "against the great weight of authority." App. 9a & n.5.

7. Judge Tashima dissented. He explained that Washington's "telephone harassment statute is unconstitutional under the First Amendment, as applied in this case, because it criminalizes speech that is—despite its vulgarity and harassing nature—public or political discourse protected by the First Amendment." App. 13a. In his view, the facts confronted by the D.C. Circuit in *Popa* were "strikingly similar" to this case, the statute at issue there had "near-identical intent requirements" to the Washington statute, and the D.C. Circuit's opinion was persuasive that the restriction "the statute placed on speech was 'greater than is essential to the furtherance of an important government interest.' " App. 14a-15a (quoting *Popa*, 187

F.3d at 676). As Judge Tashima explained, "[d]espite the vulgarity and harassing nature of the calls, they, nonetheless, were complaints about the actions and inactions of the government," and the statute "could have been drawn more narrowly, with little loss of utility to the state of Washington, by excluding from its scope those who intend to engage in public or political discourse." App. 15a-16a. The statute therefore failed First Amendment scrutiny as applied to Waggy. *Id.*

8. The Ninth Circuit's decision conflicts with the precedents of this Court, squarely splits with a D.C. Circuit opinion that is on all fours, and presents a question of tremendous importance on the scope of First Amendment speech and petition protections. This Court has recently made crystal clear that content neutrality means just that: "Government regulation of speech is content based if a law applies to particular speech because of the *topic discussed* or the idea or *message expressed*." *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (emphases added); *see McCullen* v. *Coakley*, 573 U.S. 464, 479 (2014) (regulation is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred" (internal quotation marks omitted)). Washington Revised Code § 9.61.230(1)(a) is content based on its face: it requires considering the content of the speech to determine whether it included "lewd, lascivious, profane, indecent, or obscene words or language." That the jury found Waggy intended to harass does not change the analysis, because "defining regulated speech by its function or purpose" is also content based speech regulation "subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227; *see also Fed. Election Comm'n* v. *Wisconsin*

Right To Life, Inc., 551 U.S. 449, 468 (2007) (lead op.) (A "speaker's motivation is entirely irrelevant to the question of constitutional protection." (internal quotation marks omitted)); *id.* at 495 (Scalia, J., concurring in the judgment) (agreeing on that point). That is precisely what the D.C. Circuit concluded when it held that a substantively identical statute on strikingly similar facts failed heightened scrutiny when applied to somebody calling a government office to complain about the government's conduct. *Popa*, 187 F.3d at 678. As Judge Randolph put it then—in what could now be read as a rebuke of the Ninth Circuit's reasoning— "[t]he act of speaking on the phone is also a form of conduct but it still is 'speech.' * * * To characterize [] telephone calls intended to annoy or harass as 'conduct' rather than speech is to confuse the analysis." *Id.* at 679 (Randolph, J., concurring). The circuits' disagreement is not on a trivial subject: Whether and how the government my punish those who petition for a redress of grievances, based on what words they use in petitioning, is a question touching the core of the First Amendment.

9. Applicant Robert M. Waggy has retained Neal Kumar Katyal of Hogan Lovells US LLP, Washington, D.C., to file a petition for certiorari. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including: (1) a merits reply brief in *McKinney* v. *Arizona*, No. 18-1109 (U.S.), due November 25, with oral argument scheduled on December 11; (2) a petition for certiorari in *City of Miami* v. *Wells Fargo & Co.*, No. 14-14544 (11th Cir.), due November 25; (3) a merits response brief in *Romag Fasteners Inc.* v. *Fossil Inc.*, No. 18-1233 (U.S.), due November 26, with oral argument scheduled on

January 14; (4) summary judgment response and reply briefs in *United States ex rel. Krahling* v. *Merck & Co., Inc.*, No. 10-cv-4374 (E.D. Pa.), due November 26 and December 20, respectively; (5) an en banc brief in *Price* v. *Godiva Chocolatier, Inc., et al.*, No. 16-16486 (11th Cir.), due December 4; (6) a reply brief in support of certiorari in *Ambac Assurance Corporation* v. *Financial Oversight & Management Board*, No. 19-387 (U.S.), due December 11; (7) a reply brief in support of certiorari in *Assured Guaranty Corp.* v. *Financial Oversight and Management Board*, No. 19-391 (U.S.), due December 11; (8) a petition for certiorari in *Steiner* v. *Utah State Tax Commission*, No. 20180223 (Utah), due December 12; (9) a petition for certiorari in *Taylor* v. *County of Pima*, No. 17-16980 (9th Cir.), due December 12; and (10) a reply brief in support of certiorari in *Smith* v. *United States*, No. 19-361 (U.S.), due December 23. Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

10. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 3, 2020.

Respectfully submitted,

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